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NTSB Order No. EA-3567

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 5th day of May, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

AIR SAN JUAN/CHARTAIR, INC., and  
CHRISTOPHER K. MARSDEN,

Respondents.

Docket s SE-12428  
SE-12429

OPINION AND ORDER

Respondents have appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on March 3, 1992, following an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed emergency orders of the Administrator: 1) revoking respondent Air San Juan's ("ASJ") air carrier operating certificate ("ACOC"); and 2) revoking respondent Marsden's airline transport pilot ("ATP") certificate.<sup>2</sup> In the case of

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<sup>1</sup>The initial decision, an excerpt from the hearing transcript, is attached.

<sup>2</sup>The law judge, by order of March 11, 1992, consolidated the proceedings on the Administrator's motion.

ASJ, emergency revocation was premised on violation of dozens of subsections of the Federal Aviation Regulations ("FAR," 14 C.F.R.).<sup>3</sup> Respondent Marsden, who is an owner, director of operations, and president of ASJ, was charged with violating sections 91.9(a) (operating aircraft without complying with operating limitations prescribed by the certificating authority), 135.293(a) and (b) (operating aircraft without yearly testing and competency check), and 61.59(a)(2) (falsifying records regarding training instruction and check rides given other ASJ pilots). We deny the appeal.

The law judge held 5 days of hearings, producing a transcript in excess of 1500 pages.<sup>4</sup> The Administrator introduced eight witnesses, five of whom were former ASJ pilots testifying with immunity from FAA enforcement action. The pilots

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<sup>3</sup>Provisions of the cited sections are too numerous to reproduce. The complaint contained 92 paragraphs, many of which included multiple charges. Alleged violations of FAR Part 135 included: use of an unqualified check airman or instructor; use of pilots who did not have the required operating experience on particular aircraft; use of pilots who had not completed the required training program; failure to include accurate weight in load manifest; failure to repair and maintain aircraft as required; and operating unairworthy aircraft. Alleged violations of FAR Part 91 included: lack of required maintenance log entries; maintaining a second (yet still incomplete) set of maintenance records not made available to FAA inspectors; and operation of aircraft that did not contain equipment required by their certificates. FAR Part 61 violations involving fraudulent logbook entries were also cited.

<sup>4</sup>Both prior to and during the hearing, the law judge granted minor motions by both sides to amend the complaints. Thus, a few counts were withdrawn, including the § 91.9(a) allegation in the order against Mr. Marsden. In addition, respondent ASJ, which in its answer had denied all charges, admitted the FAR section 43.9(a) violation contained in ¶ 20 and ¶ 21 of the ASJ complaint.

testified to a systematic lack of compliance with FARs regarding pilot qualification, equipment maintenance, and aircraft airworthiness. They admitted that they had signed certificates of completed training despite the fact that all the required training had not been provided. They pointed out that Mr. Marsden, who was ASJ's flight instructor in the vast majority of incidents, had done so as well. See, e.g., Tr. at 116-126, 272-287. Also, training certificates were dated by Mr. Marsden prior to the date the training was completed, and the pilots operated aircraft in passenger-carrying flights in the interim. Id. at 156-157, 302-303. As a result, numerous flights were operated by unqualified pilots.

FAR procedures for recording mechanical irregularities were not followed, allegedly at Mr. Marsden's directions and at the threat of job loss. Instead of using the forms provided in the "can" in the aircraft itself, pilots were directed to use a separate notebook, not offered to the FAA at the time of inspections, and which was kept in a drawer in an office. See Exh. C-25 for some of these entries, which include the response of maintenance personnel. The aircraft were not automatically grounded in the event of a write-up. Tr. at 34, 522-523, 530-538, 668-671.<sup>5</sup>

A witness for the Administrator testified that most, if not

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<sup>5</sup>At the time, ASJ's manual required that all irregularities be corrected prior to takeoff. ASJ had not yet received FAA authorization for use of a minimum equipment list ("MEL"), which would have allowed the aircraft to be operated with certain equipment not functioning.

all, the noted defects rendered the particular aircraft unairworthy. Tr. at 892-928. Moreover, the Administrator's evidence indicated that repairs were not always timely, and that no records existed to show that certain mechanical problems were ever corrected. Finally, even if the "secret" notebook list of discrepancies was acceptable under the FAR, the Administrator introduced testimony showing that, in instances where repairs were made, the mechanic's notes did not meet FAR requirements, and that permanent aircraft maintenance logs remained incomplete. Tr. at 960-968, 977.

Respondent and his wife (the co-owner of ASJ) testified in rebuttal. Mr. Marsden confirmed the existence of the two sets of records, but alleged that it was reasonable not to log in the aircraft's permanent maintenance record small irregularities that in his opinion did not affect aviation safety when the effect would be to ground the aircraft. Tr. at 1310-1311. He urged that none of the mechanical irregularities that went uncorrected jeopardized the airworthiness of the aircraft. As to the flight instruction and training certifications, he stated that, if the certificate indicated that training had been given, he had given it. He acknowledged, however, that the dates written on the forms might not, in all cases, be the actual date the training was completed. Tr. at 1144-1145. He stated his belief that ASJ's FAA inspector had approved his method of counting training time (which included preflight, in addition to flight, time). Id. at 1071.

In affirming the Administrator's orders, the law judge recognized the extent to which credibility determinations affected the outcome.<sup>6</sup> The law judge found the only reasonable inference from the evidence was that "respondents intentionally falsified training certificates and airman competency/proficiency checks for the purpose of keeping pilots available for flight time." Tr. at p. 1586. He further found that ASJ deferred maintenance and allowed the use of aircraft that were not airworthy. He concluded that respondent Marsden "became so obsessed by competition and profit that aviation safety became seriously compromised." Id. at p. 1586. Because he found no extenuating or mitigating circumstances, and noting that the maintenance and airworthiness violations alone would have justified revocation, he affirmed that sanction. Id.

On appeal, respondents first raise a number of questions of law that they argue undermine the law judge's decision in both cases. They argue that the law judge erred in failing to rule separately on each charge and in failing to dismiss allegedly vague charges. Error is also claimed in the finding, as to respondent Marsden, of a Part 61 violation, on the grounds that, because the rule refers to a certificate under this part and because he was operating under a Part 135, not a Part 61,

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<sup>6</sup>Respondent's answer in many cases was diametrically opposed to the testimony of the Administrator's witnesses, and there was no documentary evidence to support either's statement. It became, therefore, a credibility question, made in the context of the overall record.

certificate at the time, Part 61 is not applicable.<sup>7</sup> Respondent also claims that the standard applied for revocation, often referred to as "compliance disposition," is unlawful, not having been the subject of Administrative Procedure Act ("APA") processes. Finally, respondents claim use of "KGB tactics," apparently in the Administrator's use of witnesses who had been granted certain immunity from FAA action.<sup>8</sup> None of these contentions is valid, or warrants reversal.

First, there is no requirement either in the APA or under principles of due process that the law judge include in his decision a repetition of all the charges and a specific finding as to each. No good or useful purpose would be served by such an empty exercise. The law judge's findings were clear, and put respondents on notice of his conclusions on all the matters before him. If respondents believe that the record does not support the law judge's finding as it relates to particular counts, it is their right to raise those matters on appeal by way of specific argument and citation showing the law judge's finding to be either legal error or unsupported in the record. Their appeal makes no effort to do so.

Similarly, there was no lack of due process caused by the

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<sup>7</sup>Although the appeal states that this set of arguments applies to both proceedings, this allegation clearly only applies to the order against Mr. Marsden.

<sup>8</sup>Throughout the hearing, respondents' counsel had suggested that these witnesses were forced to come forward and testify against Mr. Marsden and ASJ or risk prosecution themselves. Therefore, it was argued, their testimony was unreliable.

occasionally generalized wording of the complaint. The purpose of the complaint is to apprise respondents of charges against them so that a defense can be prepared. Respondents, by this argument, attempt unsuccessfully to avoid the issue of proper trial preparation. The complaint, as filed, not only apprised respondents of the charges, it was as complete as possible under the circumstances.

Respondents claim themselves unable to defend against a charge that does not name a specific date, yet the lack of dates is at least partially due to respondents' failure to keep required records as it is to the witnesses' inability to recall specific dates months or years earlier. Equally important, respondents ignore the fact that they had the opportunity to use discovery (including subpoenas to examine records, such as pilot flight logbooks) to obtain further details. Much of this case is founded on respondent ASJ's failure to keep the records required by the FAR. Respondents can not be permitted to avoid prosecution by citing the absence of records when, if ASJ had complied with the regulations, those records would have provided the sought specificity.

In addition, as the Administrator points out, respondents have not shown how either was prejudiced by the law judge's handling of these first two matters. In fact, respondent Marsden was able fully to recall and respond regarding individual charges.

Respondents' next argument concerns the wording of § 61.59.

The applicable section reads:

(a) No person may make or cause to be made -

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance or exercise of the privileges, or any certificate or rating under this part.

That is, it prohibits fraudulent or false entries in logs, when those logs are required for the issuance of or operations under a certificate or rating issued under Part 61. That ASJ's operations were conducted under Part 135 does not alter the fact that Mr. Marsden was found to have made fraudulent entries in documents (for example, the training certificates) that were required for the issuance and exercise of privileges under Part 61. Thus, the applicability of the section is established. Cf. Administrator v. Adams, 3 NTSB 3142 (1980) (§ 61.59(a)(2) prohibits false statements in letter of proficiency for Part 135 pilot qualification).<sup>9</sup>

We likewise find no merit in the argument that, because the standard for revocation has not been reduced to a regulation or adopted through a policy statement after notice and comment, its application is unlawful. Respondents ignore one of the most basic rules of administrative law: precedent such as this standard may be established through adjudication. Respondents have the opportunity to challenge the merits of the standard,

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<sup>9</sup>Even were these alleged violations omitted from the complaint and the law judge's findings, it would not change the ultimate conclusion. The other violations, which demonstrate such disregard for the regulatory authority of the Administrator, are more than sufficient to justify revocation.



when and as it is applied to them. They have not done so.

In any case, we have long maintained that it is not our role to consider the underlying lawfulness of FAA policy.

Administrator v. Smith, NTSB Order EA-3469 (1992) at pps. 2-3.

See also, Administrator v. Rochna, NTSB Order EA-3184 (1990),  
affd Rochna v. NTSB, 929 F.2d 13 (1st Cir. 1991).<sup>10</sup>

And, finally, we do not credit respondents' suggestion that, because witnesses were testifying under grants of immunity, their testimony should be discarded. As we have already noted, and as respondents' counsel acknowledged at many points during the hearing, the question is one of credibility. Resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge.

Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there. Respondents offer no particular reason why, on this record, the law judge's credibility determination should be found arbitrary and capricious, and no such reason is apparent to us.

As to respondent Marsden personally, the appeal charges that ATP revocation for actions in the course of duties under Part 135, as opposed to activities as a pilot, somehow violates due process. Respondent's theory escapes us. The record clearly demonstrates Mr. Marsden's lack of compliance disposition and

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<sup>10</sup>Respondent Marsden makes the same claim in the context of the sanction imposed on him. He argues that the FAA's position that it may suspend or revoke a pilot's license for charges unrelated to the exercise of his privileges is an established policy, but it may not be used because it has never been adopted through notice and comment procedures. The same conclusion applies.

revocation of his ATP is an appropriate remedy.

Respondent Marsden's last claim -- that he is constitutionally entitled to a jury trial -- has been rejected. Hill v. NTSB, 886 F.2d 1275, 1281 (10th Cir. 1989).<sup>11</sup>

In sum, we find no error in the law judge's conclusions. In regard to the training issues, at best the record demonstrates respondents' unacceptably lax attitude towards recordkeeping as well as the certification requirements established by the Administrator. At worst, the evidence supports findings that Mr. Marsden's falsification of documents compromised safety by denying pilots required training so that individuals could pilot flights before training was complete, thereby minimizing training expenses.

The same can be said for the maintenance-related violations. Not only are the recordkeeping violations extensive (not properly logging mechanical defects, not returning aircraft to service properly in cases where repairs were made, not keeping complete maintenance records, and not keeping aircraft logbook in aircraft), but ASJ's practices through Mr. Marsden adversely affected the airworthiness of the aircraft and compromised the safety of passengers. Mr. Marsden's attitude -- that he can properly judge irregularities that should ground the aircraft and those that should not, and can interpret regulations in a manner to suit his situation -- is wholly unjustified, unsupportable,

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<sup>11</sup>See also Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986) (revocation is not a criminal penalty and, therefore, normal guarantees of criminal trial not applicable).

and antithetical to aviation safety.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeal is denied; and
2. The initial decision and the emergency orders of revocation are affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.